Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

FRANK D. GILLIS, ET AL.,
Petitioners

v.

JOHN HOLLWELL, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN HOLLAWELL,	: CIVIL NO. 4:CV-00-1222
	:
Petitioner	: (Judge Muir)
v.	:
	: (Magistrate Judge Smyser)
FRANK D. GILLIS and	:
WILLIAM WARD,	:
Pennsylvania Board of	:
Probation and Parole,	:
	:
Respondents	:

REPORT AND RECOMMENDATION

On July 10, 2000, the petitioner, a state prisoner proceeding *pro se,* filed a petition for a writ of habeas corpus. Hollawell was convicted in the Court of Common Pleas of Philadelphia County in June of 1989 and in April of 1990 of offenses involving corrupt organization and bribery. He received prison sentences of, respectively, five to twenty years and eighteen months to thirty-six months. He became eligible for parole on November 2, 1994. His maximum release date is May 2, 2011. The Pennsylvania Board of Probation and Parole has refused his application for release on parole. The petitioner is not attacking his conviction. The petitioner claims that the Pennsyvlania Board of Probation and Parole's July 21, 1999 denial of parole was in violation of the Ex Post Facto Clause of the United States Constitution. The petitioner is seeking an order directing his release from custody on parole.

By an Order dated July 17, 2000, the respondents were ordered to show cause on or before August 7, 2000

why the petitioner should not be granted habeas corpus relief. The Order of July 17, 2000, provided that the petitioner may file a reply to the response to the show cause order within ten days of the filing of the response.

On July 31, 2000, the petitioner filed a motion seeking permission to obtain discovery and a brief in support of that motion.

On August 1, 2000, the respondents filed a document entitled "Respondents' Motion to Dismiss" and a brief in support of that motion. The respondents stated that the petitioner had filed a prior petition for a writ of habeas corpus — *Hollawell v. Gillis,* No. 4:99-CV-1502 (M.D. Pa.) — challenging the denial of his parole in which he raised numerous claims but no ex post facto claim, that that prior petition was denied by this court and is on appeal to the United States Court of Appeals for the Third Circuit, and that, therefore, the instant petition should be dismissed as a second or successive petition pursuant to 28 U.S.C. § 2244(b).

On August 11, 2000, the petitioner filed a document entitled "Plaintiff's Motion to Dismiss Respondents' Motion to Dismiss" and a brief in support of that motion. The petitioner argued, *inter alia*, that the instant petition is not a second or successive petition because his prior petition challenged a prior denial of parole and not the July 21, 1999 denial of parole.

By an Order dated August 24, 2000, the respondents were granted an extension of time to file a response to the petitioner's motion for discovery. The respondents were ordered to file their response to the motion for discovery within ten days after the court rules on their motion to dismiss.

On the basis of the assertion by the petitioner that his prior petition challenged a different denial of parole than is at issue in the instant case, we concluded that the instant petition has not been shown to be a second or successive petition and by an Order dated September 28, 2000 we denied the respondents' motion to dismiss. The Order of September 28, 2000 ordered the respondents to show cause within fifteen days why the petitioner should not be granted habeas corpus relief and provided that the petitioner may file a reply to the response within ten days after the response is filed.

On October 10, 2000, the petitioner filed a motion for a default judgment and a brief in support of that motion.

On October 10, 2000, the respondents filed a brief in opposition to the petitioner's motion seeking discovery. On October 12, 2000, the respondents filed an answer to the petition.

On October 23, 2000, the petitioner filed a reply to the respondents' answer to his petition. Also, On October 23, 2000, the petitioner filed a reply brief in support of his motion seeking discovery.

By a separate Order issued this date, we denied the petitioner's motion for discovery and motion for a default judgment.

The respondents contend that the petition should be dismissed because the petitioner has not exhausted available state remedies.

A state prisoner must exhaust available state remedies before filing a petition for habeas corpus in federal court. 28 U.S.C. § 2254(b) and (c). This requirement serves the interests of comity between the federal and state systems by allowing the state an initial

opportunity to determine and correct any violations of a prisoner's federal rights. *O'Sullivan v. Burchell*, 119 S.C. 1728, 1732 (1999) ("Comity ... dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.").

A habeas corpus petitioner bears the burden of demonstrating that he has exhausted state remedies. *O'Halloran v. Ryan*, 835 F.2d 506, 508 (3d Cir. 1987). In order to exhaust state remedies for federal habeas corpus purposes, a petitioner must show that he has fairly presented his claim to the state courts. *Picard v. Connor*, 404 U.S. 270, 278 (1971). To be fairly presented to the state courts both the legal theory and the facts supporting the claim must have been presented to the state courts. *O'Halloran, supra,* 835 F.2d at 508. Further, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan, supra*, 119 S.Ct. at 1732.

Despite the exhaustion requirement, an application for a writ of habeas corpus may be denied on the merits notwithstanding the failure of the petitioner to exhaust state remedies. 28 U.S.C. § 2254(b)(2).

There is some question about whether a Pennsylvania prisoner challenging the denial of parole on constitutional grounds has any available state remedies.

In *Reider v. Pennsylvania Bd. Of Probation & Parole*, 514 A.2d 967, 971 (Pa. Commw. Ct. 1986), the Pennsylvania Commonwealth Court held that under Pennsylvania law a prisoner has no constitutionally protected liberty interest in parole and that, therefore, a

denial of parole may not be judicially reviewed in Pennsylvania. After *Reider*, other panels of the Commonwealth Court followed its holding. *See e.g. Shaw v. Pennsylvania Bd. Of Probation & Parole*, 671 A.2d 290, 292 (Pa. Commw. Ct. 1996) (due process and equal protection claims in connection with denial of parole unreviewable); *King v. Pennsylvania Bd. Of Probation & Parole*, 534 A.2d 150, 151 (Pa. Commw. Ct. 1987)(retaliatory denial or parole not reviewable). Other panels, however, seemed to retreat somewhat from *Reider's* holding. *See e.g. Murgerson v. Pennsylvania Bd. Of Probation & Parole*, 579 A.2d 1335, 1336 n.2 (Pa. Commw. Ct. 1990)(commenting that imposition of parole condition not subject to judicial review absent an allegation that the condition violates a prisoner's constitutional rights); *McCaskill v. Pennsylvania Bd. Of Probation & Parole*, 631 A.2d 1092, 1094 n.2 (Pa. Commw. Ct. 1993)(stating that judicial review of Parole Board's order includes determination of whether constitutional rights were violated).

In *Burkett v. Love*, 89 F.3d 135 (3d Cir. 1996), the United States Court of Appeals for the Third Circuit predicted that the Pennsylvania Supreme Court would hold that the Commonwealth Court of Pennsylvania has jurisdiction over appeals from denials of parole based on constitutional grounds. The *Burkett* court also stated that even if the Commonwealth Court does not have jurisdiction over direct appeals, a prisoner may still file either a petition for a writ of habeas corpus or a petition for a writ of mandamus in the state courts. Thus, according to *Burkett* a prisoner has three potential ways of attacking a denial of parole in Pennsylvania — appeal, mandamus, or habeas corpus. *Id.* at 142. Although the *Burkett* court held that a prisoner in Pennsylvania challenging the denial of parole on constitutional grounds has state remedies available, it recognized that

Pennsylvania law was unsettled and stated that "a ruling by the state Supreme Court or Commonwealth Court discussing the scope of the *Reider* opinion and the proper channels for bringing such claims would be helpful in the this frequently litigated area of state law." *Id.* at 142.

After the *Burkett* opinion, both the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court addressed the proper channels for the Pennsylvania prisoner to bring a constitutional challenge to a denial of parole.

In *Weaver v. Pennsylvania Bd. of Probation & Parole*, 688 A.2d 766 (Pa. Commw. Ct. 1997), the Commonwealth Court of Pennsylvania rejected the holding and reasoning of *Burkett*. The *Weaver* court stated that the Commonwealth Court does not have jurisdiction over appeals of denials of parole and that state habeas corpus is also not available to challenge a decision of the Board denying parole. 688 A.2d at 775. But see, *Myers v. Ridge*, 712 A.2d 791, 794 (Pa. Commw. Ct. 1998) ("decisions to grant or deny parole are generally not appealable except to the extent that a constitutional or statutory violation has occurred."). The *Weaver* court held that a parole eligibility decision may be challenged by way of a petition for a writ of mandamus, but that such a petition would only be granted where "the Board's refusal to grant parole, as evident solely in its decision, was, as a matter of law, based upon an erroneous conclusion that it had the discretion to deny parole for the reason given." *Id.* at 777.

In *Rogers v. Pennsylvania Bd. Of Probation & Parole*, 724 A.2d 319 (Pa. 1999), prisoners claimed that the denial of parole by the Board was arbitrary and capricious. The Pennsylvania Supreme Court held that "the courts of the Commonwealth do not have statutory jurisdiction to conduct appellate review of a decision of

the Board, since such a decision does not constitute an adjudication." *Id.* at 322. The *Rogers* court did note, however, that while prisoners "are not entitled to appellate review of a Parole Board decision, they may be entitled to pursue allegations of constitutional violations against the Parole Board through a writ of mandamus, or through an action under 42 U.S.C. § 1983." *Id.* At 323 n.5.

The state case law since *Burkett* has not definitively answered the question of what, if any, review of constitutional claims in the parole denial context Pennsylvania courts will entertain.[1] However, based on the state case law since *Burkett*, it appears that "the Pennsylvania courts provide a single avenue of relief to prisoners claiming their parol denials were unconstitutional: a mandamus action in the

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[1]On August 25, 1999, the United States Court of Appeals of the Third Circuit certified the following questions of law to the Pennsylvania Supreme Court: "1. May a person who has been denied parole from a Pennsylvania sentence obtain review from a Pennsylvania state court of a claim that the denial of parole violated the Ex Post Facto Clause of the United States Constitution? 2. If so, may review be secured on direct appeal, through a petition for a writ of mandamus, or in some other manner?." *Coady v. Vaughn*, 98-1311, slip order (3d Cir. Aug. 25, 1999). By an Order dated September 15, 1999, the Third Circuit supplemented its Petition for Certification to the Pennsylvania Supreme Court by informing that court that the same issue is presented in forty other cases pending in the Third Circuit. *Coady v. Vaughn*, 98-1311, slip order (3d Cir. Sept. 15, 1999). By an Order dated December 17, 1999, the Pennsylvania Supreme Court granted the Third Circuit's Petition for Certification. *Coady v. Vaughn*, slip order (Pa. Dec. 17, 1999). The Pennsylvania Supreme Court has not yet answered the questions certified to it by the Third Circuit.

Commonwealth Court's original jurisdiction." *Carter v. Muller*, 45 F. Supp.2d 453, 455 (E.D. Pa. 1999).

The respondents argue that the petitioner has failed to exhaust state remedies. The respondents argue that although the petitioner alleged that he filed a petition for a writ of mandamus to the Supreme Court of Pennsylvania on December 22, 1999, the petitioner has not alleged that he filed any action in a lesser state court seeking review of his claim. Accordingly, the respondents argue that the petitioner has not presented his claim to the Pennsylvania courts in a procedurally correct manner.

The petitioner contends that not only did he present a petition for a writ of mandamus to the Pennsylvania Supreme Court raising his *ex post facto* claim[2] but that he also presented a petition for a writ of mandamus to the Commonwealth Court of Pennsylvania raising his *ex post facto* claim. The petitioner has presented an Order dated December 13, 1999, from the Commonwealth Court of Pennsylvania which provides:

> NOW, December 13, 1999, it appearing that petitioner seeks by way of mandamus to be paroled, and that the decision as to whether to grant parole is discretionary, see Reider v. Pennsylvania Board of Probation and Parole, 514 A.2d 967 (Pa. Cmwlth. 1986), and, therefore, not subject to mandamus in

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[2]The petitioner has presented an Order from the Supreme Court of Pennsylvania dated March 27, 2000, which provides: "**AND NOW**, this 27th day of March, 2000, the request for leave to file an the Motion to Relax the Required Number of Copies to be Filed are granted and the Application for Immediate Hearing and the Petition for Writ of Mandamus are denied." (Doc. 2, Exhibit 6).

> our original jurisdiction, the petition for review is dismissed.

(Doc. 22, Exhibit 1).

The above order from the Commonwealth Court seems to indicate that the petitioner had no available state court remedies to challenge his denial of parole on *ex post facto* grounds. Nevertheless, the petitioner did attempt to present his claim to the state courts. We conclude that the petitioner has exhausted his state court remedies.

On July 21, 1999, the Pennsylvania Board of Probation and Parole (Board) denied the petitioner parole. The Board stated:

> Following an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole. You are therefore refused parole and ordered to: be reviewed in or after September, 2000.

Doc. 2, Exhibit 4. It is this denial of parole that the petitioner is challenging as an *ex post facto* violation.

The United States Constitution forbids *ex post facto* laws. U.S. Const. Art. I, §9 & §10. The *Ex Post Facto* clause is aimed at laws that retroactively alter the definition of a crime or that increase the punishment for criminal acts. *California Dept. Of Corrections v. Morales*, 514 U.S. 499, 504 (1995). Two critical elements must be present for a law to be found to be *ex post* facto: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (footnotes omitted).

Retroactive changes in laws governing parole of prisoners may in some instances violate the prohibition against *ex post facto* laws. *Garner v. Jones*, 120 S. Ct. 1362, 1367 (2000). "[T]he Ex Post Facto Clause should not be employed for 'the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures.'" *Id.* at 13678 (quoting *Morales, supra,* 514 U.S. at 508). The *Ex Post Facto Clause* does not forbid every legislative change that has any conceivable risk of affecting a prisoner's punishment. *Morales, supra,* 514 U.S. at 508. Rather, the controlling inquiry is whether the change creates "a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 509. The prisoner "must show that as applied to his own sentence the law created a significant risk of increasing his punishment." *Garner, supra,* 120 S.Ct. at 1370.

In the instant case, the petitioner claims that a change in 61 P.S. § 331.1 has been applied to him in violation of the *Ex Post Facto* Clause.

At the time the petitioner committed his crimes, 61 P.S. § 331.1 provided:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and efficient parole administration, and to that end it is the intent of this act to create a uniform and exclusive system for the administration of parole in this Commonwealth.

In 1996, 61 P.S. § 333.1 was amended and now provides:

> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison.
>
> In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public. In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

The petitioner contends that the amendment which includes the provision that the Board "shall first and foremost seek to protect the safety of the public" has been retroactively applied to him and has caused him not to be paroled.

In determining whether a change in the law violates the *Ex Post Facto* Clause, "[i]t is axiomatic that '[w]e must compare the two statutory procedures in toto to determine if the new [law] may be fairly characterized as more onerous." *Crowell v. U.S. Parole Comm'n*, 724 F.2d 1406, 1409 (3d Cir. 1984) (quoting *Dobbert v. Florida*, 432 U.S. 282, 294 (1977)).

In the instant case, although the old version of 61 P.S. § 331.1 did not contain a directive that the Board protect the public, protection of the public was a factor that the Board was to consider. 61 P.S. § 331.21 provided:

> The board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment, whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby.

Both before and after the 1996 amendments to the Parole Law, the Board was charged with protecting the public. The law in this respect did not change. The standard for granting or denying parole did not change. However, we recognize that the change in 61 P.S. § 331.1 may be seen as a change in emphasis.

Both before and after the 1996 amendments the Board had and has discretion to grant or deny parole. *See* 61 P.S. § 331.21 (1993); 61 P.S. § 331.21 (1999).

The presence of discretion in a parole system does not displace the protections of the Ex Post Fact Clause. *Garner, supra,* 120 S.Ct. At 1369. However, "[c]hanges in vigor in the application of existing laws are not new laws subject to invalidation by the ex post facto clause." *Bonilla v. Vaughn,* No. Civ. A. 97-7440, 1998 WL 480833 at *7 (E.D. Pa. Aug. 14, 1998) ("At most, petitioner has set forth some evidence from which it may be inferred that the Board has exercised a change in emphasis of the implementation of existing laws which change is not unconstitutional."); *See also Garner, supra,* 120 S.Ct. At 1369 ("On the other hand, to the extent that there inheres in ex post facto doctrine some idea of actual or constructive notice to the criminal before commission of the offense of the penalty for the transgression, we can say with some assurance that where parole is concerned discretion, by its very definition, is subject to changes in

the manner in which it is informed and then exercised."); *Prater v. U.S. Parole Comm'n*, 802 F.2d 948, 952 (7th Cir. 1986) ("If judges get tougher on crime by meting out stiffer sentences or resolving more close procedural questions against criminal defendants, or prosecutors drive harder plea bargains, or the Parole Commission takes a more jaundiced view of applications for parole, the ex post facto prohibition is not violated, even though a criminal's punishment may end up being longer or harsher than he hoped when he committed the crime.").

A change in how the Board exercises its discretion or what factors it emphasizes is merely part of the uncertainty which was inherent in the Pennsylvania discretionary parole system, to which the petitioner became subject as the result of his imprisonment following his conviction of crimes. The petitioner can not establish an *Ex Post Facto* violation.

Based on the foregoing, it is recommended that the petition for a writ of habeas corpus be denied and that the case file be closed.

J. Andrew Smyser
Magistrate Judge

Dated: November 2, 2000.